Supreme Court, U.S.
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No. 05-1103

In The

Supreme Court of the United States

GUY C. PATTERSON,

Petitioner,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether Congress in the Veterans' Preference Act of 1944 addressed the issue how veterans' preference must be applied to attorney vacancies within the Executive branch?

II. Whether the power to implement the Veterans' Preference Act of 1944 includes the power to exempt occupations from the operation of the statute?

III. Whether the Office of Personnel Management's regulation exempting attorney positions from the requirements of veterans' preference is arbitrary and capricious in light of the reasons relied upon for the change in policy?

PARTIES TO THE PROCEEDING

Petitioner Guy C. Patterson instituted the administrative appeal to the Merit Systems Protection Board (MSPB) in this case. The Department of the Interior (DOI) was the responding agency in that proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Guy C. Patterson respectfully petitions for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 424 F.3d 1151. (App. 1a-19a) Both the final opinion of the Merit Systems Protection Board (MSPB) (App. 20a-21a) and the initial decision of the Administrative Judge (AJ) (App. 22a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 19, 2005. The court of appeals denied a combined petition for rehearing and for rehearing *en banc* on November 29, 2005. (App. 31a) Jurisdiction in this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Veterans' Preference Act of 1944 is reproduced in the appendix to this petition at App. 32a-42a.

The relevant provision of Title 5 of the Code of Federal Regulations is also set forth at App. 42a-43a.

STATEMENT

This case poses the question how veterans' preference must be applied to attorney vacancies within the Executive branch. Petitioner Guy C. Patterson applied unsuccessfully for a job as a lawyer with the U.S. Department of the Interior in Pittsburgh, Pennsylvania. Notwithstanding Patterson's undisputed status as a preference-eligible veteran, the agency selected a non-veteran for the job.

After exhausting his administrative remedies with the Department of Labor, Patterson appealed to the MSPB under 5 U.S.C. 3330a(d)(1) (Supp. 2005),[1] enacted as part of the Veterans Employment Opportunities Act of 1998 (VEOA), Pub. L. No. 105-339, 112 Stat. 3182. Patterson maintained, *inter alia*, that the agency's selection of a non-veteran without requesting permission to "pass over" a qualified preference-eligible veteran violated his rights under the Veterans' Preference Act of 1944, Pub. L. No. 78-359, 58 Stat. 387 (codified at 5 U.S.C. 2108, 3308-3320). (Pet. App. 66-67) The agency, in turn, relied upon a regulation promulgated by the U.S. Office of Personnel Management (OPM) which permits agencies to apply the "principles" of veterans' preference to attorney positions only insofar as "administratively feasible." 5 C.F.R. 302.101(c)(9). Patterson responded that the regulation was invalid as contrary to the plain language of the statute. Finding that attorney positions are exempt from veterans' preference, the Administrative Judge (AJ) dismissed Patterson's claim for want of jurisdiction. (App. 29a) The full MSPB subsequently issued a *pro forma* decision upholding the AJ's decision. (App. 20a-21a)

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[1] All citations are to the 2000 versions of the United States Code or Code of Federal Regulations unless otherwise specified.

Patterson petitioned the court of appeals for review asserting the invalidity of the regulation. Applying the familiar two-step analysis articulated by this Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and its progeny, the court of appeals held that Congress did not address the question how agencies must apply veterans' preference in filling attorney vacancies; 5 C.F.R. 302.101(c)(9) is a legitimate exercise of OPM's delegated authority to administer the Veterans' Preference Act; and OPM's regulation is reasonable and consistent with the Veterans' Preference Act. (App. 12a-14a) The court of appeals also held, however, that the MSPB possessed jurisdiction to entertain Patterson's VEOA claim. The court of appeals nevertheless affirmed the dismissal of Patterson's VEOA claim, in light of the validity of 5 C.F.R. 302.101(c)(9), for failure to state a claim upon which relief could be granted. (App. 16a)

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

Employing more than 28,000 attorneys, the Executive branch of the Federal government is the nation's largest legal employer. Federal Human Resources Data, http://www.fedscope.opm.gov/employment.asp[2] (last visited February 20, 2006). Between approximately June 2002 and June 2004, the Federal government hired more than 8,000

[2] As of September, 2005, the Federal government employed 28,983 individuals in occupational series 0905, general attorney.